IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRYAN EDWARDS CORBETT, JR. AKA BRYAN E. NICHOLS, Appellant,	)))))))))))	NO. 63257-4-I DIVISION ONE UNPUBLISHED OPINION FILED: March 15, 2010

Lau, J. — Bryan Corbett appeals his judgment and sentence for five offenses occurring on August 2 (third degree assault and felony violation of a court order) and August 3, 2008 (second degree assault, felony violation of a court order, and felony harassment). He argues that the sentencing court abused its discretion by finding that offenses occurring on the same day did not constitute the same criminal conduct. Because the offenses involved different objective intents, we reject his contention and affirm.

FACTS

Bryan Corbett pleaded guilty to third degree assault (count one), felony violation

of a court order (count two), second degree assault (count three), felony violation of a court order (count four), and felony harassment (count five), based on events on August 2 and 3, 2008. In the plea agreement, the parties agreed that the court could use the certification for determination of probable cause to determine facts at sentencing. That document establishes the following facts: Around 1 a.m. on August 2, 2008, a neighbor called the police and reported hearing sounds of a fight coming from Zanida Green's apartment. When the police arrived, Green told them that her boyfriend and the father of her child, Bryan Corbett, had punched her and thrown things around the apartment. A prior court order prohibited Corbett from contacting Green.

On August 3, 2008, Corbett again attacked Green by wrapping an alarm clock cord around her neck and strangling her with it and later smothering her with a pillow. When he released her, Green grabbed her son and ran into the bathroom where she locked the door. She stayed in the bathroom for about 20 minutes, leaving when Corbett had quieted down. When she left the bathroom, Corbett was quietly packing his belongings. He then lit a stick of incense, put it into an electrical socket, and said he would burn Green and her son to death. Green put the incense out and told Corbett she wanted to leave, to which he responded, "No bitch, I'm gonna kill you." The police then arrived in response to a neighbor's 911 call, and Corbett fled the apartment through a window.

At sentencing, Green moved the court to consider count one and count two (the August 2 offenses) and counts three, four, and five (the August 3 offenses) as the same criminal conduct. The court denied the motion and imposed 63 months; this appeal

followed.

ANALYSIS

Corbett's sole argument on appeal is that the offenses occurring on August 2 and those occurring on August 3 constitute the same criminal conduct. The State counters that because the offenses on each day have different objective intents, occurred at different times, and had different victims, they do not constitute the same criminal conduct.

RCW 9.94A.589(1)(a) treats all "current and prior convictions as if they were prior convictions for the purpose of the offender score." That section, however, recognizes an exception "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any one of these elements is lacking, a finding of same criminal conduct is inappropriate. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). In deciding whether crimes involve the same intent, we focus on whether the defendant's intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This is determined, in part, by whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

We narrowly construe the same criminal conduct analysis. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997);

State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). And we review a trial court's determination on the issue of same

criminal conduct for an abuse of discretion or misapplication of the law. Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122–23, 985 P.2d 365 (1999).

Corbett first argues that the August 2 and 3 felony violation of a court order offenses involved the same intent as the other crimes he committed on those days. Specifically, he argues that violation of the orders furthered the assaults and the harassment because he could not commit either without violating the orders. But Corbett's self-serving statement is not determinative of intent. See State v. Freeman, 118 Wn. App. 365, 378 76 P.3d 732 (2003) (trial court not bound to accept defendant's self-serving assertion that he intended only robbery and shot the victim only to further his intent to commit robbery), aff'd, 151 Wn.2d 1074, 94 P.3d 959 (2004). And our Supreme Court has made clear that "the 'furtherance test' was never meant to be and never has been the lynchpin of this court's analysis of 'same criminal conduct.'" Haddock, 141 Wn.2d at 114. Viewed objectively, the intent for assault in the third degree is causing bodily harm and substantial pain. See RCW 9A.36.031(1)(f)[1] ("A

[1] The State's fourth amended information alleges that Corbett "with criminal negligence did cause bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Zanida Green." That language tracks RCW 9A.36.031(1)(f)'s language: "With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." The information, however, mistakenly asserts that the alleged conduct violated RCW 9A.36.021(1)(a). We also note that the State's third amended information contains the same language but lists the offense as violating RCW 9A.36.031(1)(f). Accordingly, we address RCW 9A.36.031(1)(f).

person is guilty of assault in the third degree if he or she, . . . [w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering."). For assault in the second degree, the intent is strangulation. See RCW 9A.36.021(1)(g). The intent of harassment is threatening to cause bodily injury, property damage, or confinement. See RCW 9A.46.020(1)(a)(i)-(iii). By contrast, the intent for felony violation of a court order is the intent to be where the court order prohibits the defendant from going. Thus, the objective intent for the felony violation of a court order is different from the intent for harassment and second and third degree assault. Accordingly, the sentencing court did not abuse its discretion in determining that counts one and two do not constitute the same criminal conduct. The sentencing court was also within its discretion in determining that count four did not involve the same criminal conduct as counts three or five.

Corbett also contends that the harassment (count five) and third degree assault (count three) convictions constitute the same criminal conduct. But these crimes also involved different criminal intents. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). But we have held that when a defendant has time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act" and makes the decision to proceed, the defendant has formed a new intent to commit the second act. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Here, Corbett committed the

second degree assault when he strangled Green with the electrical cord and smothered her with the pillow. He committed the harassment when he threatened to kill Green by burning down the apartment. But Corbett made that threat only after Green had locked herself in the bathroom for about 20 minutes until Corbett had quieted down. When she came out, Corbett was quietly packing his belongings. The 20 minutes in the bathroom and Corbett's quiet packing establish that he was able to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App. at 859. By then making the decision to proceed with the threats constituting harassment, he formed a new criminal intent. See, e.g., State v. Wilson, 136 Wn. App. 596, 614–15, 150 P.3d 144 (2007) (new criminal intent formed when the defendant left the house for a short period of time after he completed a physical assault but reentered the house to threaten to kill the victim with a piece of wood).

Corbett also repeatedly references joinder language in the information in an apparent argument that it establishes that the August 2 and August 3 crimes involved the same intent. See Br. of Appellant at 3, 6 ("which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate [their] proof"). But joinder language is insufficient to show that crimes comprise the same criminal conduct. See Dunaway, 109 Wn.2d at 214 n.4.

Having held that the offenses do not involve the same objective intent, we need not examine the remaining requirements because all three requirements must be satisfied for a finding of same criminal

conduct. We affirm.

WE CONCUR: